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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1925

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No. [redacted] 306

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
PETITIONER,

vs.

ANNIE NIXON, ADMINISTRATRIX OF THE ESTATE OF SAM JOE NIXON, DECEASED.

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

RANDOLPH HARRISON,
A. R. LONG,
S. H. WILLIAMS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 966.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
PETITIONER,

vs.

ANNIE NIXON, ADMINISTRATRIX OF THE ESTATE OF SAM JOE NIXON, DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

To the Honorable the Supreme Court of the United States:

Your petitioner, The Chesapeake & Ohio Railway Company, a common carrier engaged in interstate commerce, respectfully represents that it is aggrieved by a judgment of the Supreme Court of Appeals of Virginia, the highest court of the State of Virginia in which a decision can be had, entered on the 13th day of November, 1924 (rehearing denied January 22nd, 1925), in a certain action at law wherein

petitioner was plaintiff in error and Annie Nixon, Administratrix of Sam Joe Nixon, deceased, was defendant in error.

This action was commenced in the Circuit Court of Nelson County, Virginia, for damages for the death of Sam Joe Nixon, which was alleged to have been caused by the negligence of the agents or employees of the petitioner in the operation of said railway. The original suit was brought under the Federal Employers' Liability Act, as well as the Virginia Employers' Liability Act and the Virginia laws governing death by wrongful act, damages being laid under the Virginia statutes at $10,000.00, the maximum recovery allowed by said statute (See Appendix), and at $25,000.00 under the Federal Employers' Liability Act. As the verdict of the jury was for $12,000.00, the recovery must be sustained, if at all, under the Federal law.

Your petitioner avers that in the trial of said cause a right, privilege or immunity was claimed by your petitioner under the aforesaid statute of the United States, as will afterwards appear, and the decision of the Court was against said right, privilege or immunity.

Your petitioner demurred to the notice of motion by which the action was commenced on the ground that,

> (1) The notice alleges no duty owing by the defendant to the plaintiff's intestate, the breach of which constitutes actionable negligence.
>
> (2) It appears from the notice of motion that the plaintiff's intestate assumed the risk of injury from sources mentioned in said notice of motion.

which demurrer the trial court overruled.

At the trial of the said cause it appeared in evidence that the said Sam Joe Nixon, at the time of his death, had been

for some years employed by the petitioner as a section foreman in charge of the maintenance and repair of a section of its track. He occupied as a residence a house owned by your petitioner situated adjoining the right of way and distant about one and a quarter miles from the tool house at Midway Mills, the place where he commenced his day's work each morning at 7 a. m. In going to and from his work he had obtained permission of your petitioner to make use of a velocipede which ran on the rails and was propelled by the rider. On the morning of June 21, 1921, shortly after leaving his home at 6:30 a. m., Nixon was found dead by the side of the track with the velocipede broken to pieces near him. Although there were no eyewitnesses to the occurrence, the inference is that he was struck by an extra freight train which came along at about that time, the crew of which were maintaining no lookout for him, being engaged at the moment in attending to other necessary duties in connection with the operation of said train, and knew nothing of the accident until they were told of it upon reaching the terminal a few miles distant.

Upon the trial your petitioner defended upon the ground that

> IT OWED NO DUTY TO TRACK EMPLOYEES ENGAGED IN INTERSTATE COMMERCE TO MAINTAIN A LOOKOUT FOR THEM OR TO WARN THEM OF THE APPROACH OF TRAINS.

Your petitioner, defendant in the trial court, upon the conclusion of the evidence, asked the following instruction:

> "The Court instructs the jury that the employees of a railway company engaged in the maintenance and repair of a railroad track, whose business it is

> to keep the track in safe condition for the movement of trains, must maintain a lookout at all times for the approach of such trains and for their own safety, and the employees operating such trains have the right to assume that the track employees will keep the track free from obstructions, and consequently they owe no duty to such track employees of maintaining a lookout for them or of warning them of the approach of the trains."

The Court refused to give this instruction, to which action of the Court your petitioner excepted.

Your petitioner relied upon the further defense that

> THE DECEDENT, IF ENGAGED IN INTERSTATE COMMERCE, ASSUMED THE RISK OF INJURIES FROM TRAINS ON WHICH NO LOOKOUT WAS BEING KEPT FOR TRACK EMPLOYEES.

It appeared in evidence that the engine crews, while engaged in the performance of necessary duties about the engine, customarily kept no lookout for track employees, which custom and practice were known to Nixon. It also appeared that the said Nixon knew that a train might be expected to overtake him at any time without warning and that the crew might not be on the lookout for him.

Under this evidence your petitioner asked the trial Court to instruct the jury as follows:

> "The Court instructs the jury that an employee of a railway company in accepting employment as a section foreman thereon, assumes all the ordinary risks that are necessarily and normally incident to the occupation in which he engages, whether the em-

> ployee is actually aware of such risks or not. And if the jury believe from the evidence that the railway company customarily ran its trains over its tracks at or near the point of the accident in question at any time in either direction, and without maintaining a lookout for track men at such times as the engineer and firemen were engaged in the performance of necessary duties about the engine, then they are instructed that the plaintiff's intestate likewise assumed the risk of danger from such cause, and the plaintiff cannot recover in this action."

The Court refused to give this instruction, to which action of the Court your petitioner excepted.

The jury rendered a verdict of $12,000.00 against your petitioner, upon which the trial Court entered a judgment which was affirmed by the Court of Appeals, the highest court in which a decision could be had, thus rendering final judgment against your petitioner.

The Supreme Court of Appeals found that the plaintiff's intestate was employed at the time of his death in interstate commerce and that the verdict and judgment were "recovered on a liability under the Federal Employers Liability Act," but the said Court was of opinion that it was "unnecessary to deal with" the defenses relied upon by your petitioner, or "with the authorities cited to sustain such positions," on the ground that

> "these positions are all based upon the assumption of fact that the deceased was not a licensee and that the defendant owed him no higher duty than that owing to any track repairer in the discharge of his ordinary duties."

It therefore appears that in said cause your petitione claimed and especially set up a right, privilege or immunity under a statute of the United States, namely, the act en titled "An Act relating to the Liability of Common Carrier by Railroad to their Employees," approved April 22, 190 (35 Stats. at Large, 65), and the decision was against such right, privilege or immunity, and also in conflict with the decisions of this Court and other Federal Courts, as will appear from the decisions in the following cases:

Aerkfetz v. Humphreys, &c., Receivers, 145 U. S. 418;

Connelly v. Pa. Ry. Co., 201 Fed., 54, 119 C. C. A. 392;

Davis v. P. & R. RR. Co., 276 Fed., 187;

Seaboard Air Line Ry. Co. v. Horton, 233 U. S., 492;

Pryor v. Williams, 254 U. S., 43;

B. & O. Ry. Co. v. Baugh, 149 U. S., 368;

Coine v. Union Pac. Ry. Co., 133 U. S., 370;

N. & W. Ry. Co. v. Gesswine, 144 Fed., 56, 75 C. C. A., 214.

Your petitioner files herewith as an exhibit hereto a certified copy of the entire transcript of the record of said case, including the proceedings in the Supreme Court of Appeals of Virginia.

Your petitioner submits that the questions herein involved are of such general interest and importance as to warrant this Court in reviewing them.

Therefore your petitioner respectfully prays that a writ of certiorari may issue, directed to the Supreme Court of Appeals of Virginia, commanding it to certify its record herein

to this Court for review and determination by it; that a writ of supersedeas may issue to the judgment aforesaid; that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that said judgment of the Supreme Court of Appeals of Virginia may be reversed by this honorable Court.

THE CHESAPEAKE & OHIO
RAILWAY COMPANY,
By RANDOLPH HARRISON,
A. R. LONG,
E. H. WILLIAMS,
Counsel for Petitioner.

Notice of Submission of Petition for Writ of Certiorari.

To Annie Nixon, Administratrix of Sam Joe Nixon, deceased:

You are hereby notified that the undersigned will, on the 23d day of March, 1925, at 12 o'clock Noon, or as soon thereafter as counsel can be heard, submit to the Supreme Court of the United States at Washington a petition for a writ of certiorari, copy of which together with a brief in support thereof is hereto attached, to review a judgment of the Supreme Court of Appeals of Virginia, entered on the 13th day of November, 1924, a rehearing of which was refused on January 22nd, 1925, affirming upon writ of error a judgment of the Circuit Court of Nelson County, Virginia, entered on the 9th day of June, 1923, in an action at

law wherein the undersigned was defendant and you were plaintiff.

Respectfully,

THE CHESAPEAKE & OHIO
RAILWAY COMPANY,
By RANDOLPH HARRISON,
A. R. LONG,
S. H. WILLIAMS,
Counsel for Petitioner.

Acknowledgment of Service of Notice.

I hereby acknowledge legal service upon me of the foregoing notice and the accompanying petition and brief.

Given under my hand this the 5th day of March, 1925.

DUNCAN DRYSDALE,
Counsel for Annie Nixon, Administratrix of Sam Joe Nixon, Deceased, Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of Facts.

Sam Joe Nixon for ten years prior to his death had been in the employ of your petitioner in the capacity of section foreman and was employed as such at the time of the accident which resulted in his death on June 21, 1921. He was an experienced track man and thoroughly familiar with the work and its dangers and the section of the track on which he lived and was employed. He knew that it was not customary for train employees to look out for track men and that they must, therefore, keep a constant lookout for their own safety, to avoid injury from passing trains which might be expected from either direction at any time. (Rec. pp. 160, 174, 184, 217.) A year or more before the accident he asked permission of his immediate superior and obtained his consent to use a velocipede in going to and from his work, for his own personal convenience. (Rec. p. 216.) During working hours this velocipede was used by a member of his force in making a daily inspection of the track embraced in their section (p. 111).

Respondent testified that the deceased started at 6:30 o'clock in the morning of June 21, 1921, "as was his custom," on the velocipede, to go to the tool house a mile and a quarter distant, at which point he was to join his gang of section laborers and commence the day's work for your petitioner in the repair and maintenance of its track, his hours of employment being from 7 a. m. to 4 p. m. About an hour later he was found dead by members of the section force,

lying a few feet from the track, at a point 1,967 feet west of the Nixon house. Broken pieces of the velocipede were lying near the track. His watch had stopped at 6:35 a. m. There was no eyewitness to the accident but the inference was that he was struck and killed by an extra freight train going in the same direction, which passed about that time, the crew of which knew nothing of the accident, being engaged at the moment in attending to other necessary duties in connection with the operation of said train.

The engineer in charge of the engine was thoroughly experienced and familiar with his duties and had been in the employment of your petitioner thirty-two years, nine years as fireman and twenty-three years as locomotive engineer. The fireman had been in the employment of your petitioner as fireman and extra engineman thirteen years and was likewise thoroughly experienced and familiar with his duties. The uncontradicted evidence showed that it was customary and usual for the engineman to leave his position of lookout when it became necessary to give attention to the mechanism of the engine and that it frequently happens when this is the case that the engine proceeds for short periods of time without any lookout being maintained. (Rec. p. 239.)

The engineman testified that at the time when the train was passing the Nixon house, about 1,967 feet east of the point where the deceased was found, having no reason to anticipate the presence of any one on the track, and there being no crossings for nearly two miles and having a "clear track" to the terminal at Gladstone, he made use of the opportunity to give the necessary attention to the lubricating mechanism of the engine. (Rec. pp. 228-238.) Both the engineman and fireman testified that the point selected by

the engineman for performing this work was the safest that could have been selected. (Rec. pp. 240-247.) The duty involved the inspection of a device known as the lubricator which was located in the top of the engine cab, the function of which was to furnish oil to the cylinders and valves on the locomotive. In order to see to the proper lubrication of the engine, the engineman had to make an inspection from time to time of this mechanism and adjust the flow of oil in the lubricator, which could only be done by standing on his seat and using an electric light. This is one of the most important things in the smooth working of the engine. (Rec. p. 229.) The performance of this necessary duty occupied him one or two minutes and he was so engaged as he passed the Nixon house. In anticipation of attending to this duty, he took the extra precaution before mounting his seat to blow the whistle of the engine. (Rec. p. 230.) When he resumed his seat again, after the lapse of a minute or two, the train had passed the Nixon house and the point where the deceased was found. During this time the fireman testified that he was engaged in the performance of the necessary duties in connection with the firing of his engine and that by reason of his attention to these duties he was not maintaining a lookout. The engineman and fireman knew nothing of the accident until they heard of it after the train reached the division point at Gladstone, a few miles further on. (Rec. pp. 229, 230.)

The trial Court refused instructions offered by your petitioner to the effect that your petitioner owed the deceased, a track employee, no duty of lookout, and that the deceased assumed the risk of injury from passing trains operated without a lookout for him.

The jury awarded the plaintiff the sum of $12,000.00 under the Federal Employers Liability Act as damages for the death of her intestate, and the trial Court entered judgment for the respondent, to which a writ of error was awarded from the Supreme Court of Appeals of Virginia. That Court in an order entered on the 13th day of November, 1924, affirmed the judgment. A petition for a rehearing was entertained but a rehearing denied on the 22nd day of January, 1925.

Decision of the Court.

In the opening paragraph of the statement of facts preceding the opinion, it is said that the decedent was going over the defendant's track "as a licensee under the express permission of the defendant company." After completing the statement of facts the Court states the question of law to be decided as follows:

> "The chief question thus presented in various ways * * * is the following:
>
> 1. Did the defendant company owe to the decedent the duty of having its engineman and fireman, while not prevented from so doing by necessary attention in the exercise of reasonable care to their other duties, a reasonable lookout ahead for his being on the track in front of the train which killed him, on the velocipede he was then using, while traversing at his usual time in the morning for so doing that portion of the track which was between his home and Midway (at which point the tool house was located) under the express permission given him by the company to use such track."

This question, which the Court considers the chief question in the case, is answered as follows: (Italics supplied.)

> "The question must be answered in the affirmative.
>
> "It appears from the evidence that the decedent had the *express permission* of the defendant to so traverse the portion of the track mentioned at such time. He was, therefore, undoubtedly a *licensee* at the time, and, under the settled rule on the subject in this jurisdiction, the defendant company owed him the duty of having its engineman and fireman on the train which killed him, while not prevented from so doing by necessary attention, in the exercise of reasonable care, to their other duties, keep a reasonable lookout ahead for his being on the track in front of the train while it was going over the portion of the track in question.
>
> "That such is the settled rule, certainly in this jurisdiction, if the decedent was a *licensee*, is not controverted in argument before us. Several positions are, indeed, taken in argument on behalf of the defendant company, to the effect that the duty in question did not exist in the instant case; but as these positions are all based on the assumption of fact that the deceased was not a *licensee*, it is unnecessary for us to deal with them, or with the authorities cited to sustain such positions. * * *
>
> "Having *given the decedent the express permission to use the track as he was doing*, it was the duty of the defendant company to have had the engineman instructed that it was his duty to keep the aforesaid reasonable lookout for the decedent."

The Court found it unnecessary to pass upon the defenses relied upon by your petitioner, and the authorities cited to sustain them, on the ground that "these positions are all

based on the assumption of fact that the deceased was not a licensee."

If Nixon was an employee engaged in interstate commerce at the time of his death, as the Court holds—and as must be the case in view of the fact that the judgment is for $12,000.00, being $2,000.00 more than the Virginia Statutes allow—then he was not a licensee, and the decisions of the Supreme Court of the United States, the other Federal courts and innumerable State courts on the law relating to track men struck by trains apply and cannot be ignored by calling Nixon a licensee and applying the licensee doctrine to an employee engaged in interstate commerce.

On the other hand, if Nixon was a licensee, the judgment will have to be reversed because the case then comes under the Virginia law and the maximum recovery under that law is $10,000.

When a rehearing was denied the Court corrected its opinion by striking out the words "as a licensee," in the seventh line from the bottom of page 1, and by striking out the foregoing two paragraphs beginning with the words "It appears," on page 11, eighth line from the bottom, and ending with the word "positions," on page 12, eleventh line from the bottom, and inserting in lieu thereof the following:

> "It appears from the evidence that the decedent had the express permission of the defendant to so traverse the portion of the track mentioned at such time. He was going to and from the place of business in which he was employed by the defendant, along its tracks, in a vehicle provided by it, and at the usual time. As a track repairer he was not a licensee, but, under the circumstances in which he

was using the track, although a track repairer, the defendant company owed him the duty of having its engineman or fireman, on the train which killed him, while not prevented from so doing by necessary attention, in the exercise of reasonable care, to their other duties, keep a reasonable lookout ahead for his being on the track in front of the train while it was going over the portion of the track in question.

"Several positions are taken in argument in behalf of the defendant company, to the effect that the duty in question, on the part of the defendant, did not exist in the instant case; but as these positions are all based on the assumption of fact that the deceased was not a licensee, and that the defendant owed him no higher duty than that owing to any other track repairer in the discharge of his ordinary duties, it is unnecessary for us to deal with them, or with the authorities cited to sustain such positions. The duty owing to the plaintiff's intestate was not because he was a licensee in the usual acceptation of that term, but because the privilege granted him gave him the right to expect, and imposed upon the defendant the duty to exercise, a higher degree of care for his protection than if he were simply in the discharge of his ordinary duties as a track repairer."

The Court again found it "unnecessary to deal with" the defenses relied upon by your petitioner or "with the authorities cited to sustain such positions," on the ground that

> "these positions are all based upon the assumption of fact that the deceased was not a licensee and that the defendant owed him no higher duty than that owing to any other track repairer in the discharge of his ordinary duties,"

and the Court held that the duty owing to him (of maintaining a lookout) was not because he was a licensee "in the usual acceptation of that term," but because the privilege granted him (of using a velocipede in going to and from his work)

> "gave him the right to expect, and imposed upon the defendant the duty to exercise towards him, a higher degree of care for his protection than if he were simply in the discharge of his ordinary duties as a track repairer."

The decisions of the Supreme Court of the United States and the other Federal courts cannot be ignored by saying that Nixon was not a licensee *in the usual acceptation of that term*. In law he cannot be an employee engaged in interstate commerce and a licensee, *in any acceptation of the term*, at the same time. He must be without qualification either one or the other. His status as a licensee is not an assumption of fact, but must be a conclusion of law based upon the facts.

The Court assumes that because the petitioner assented to Nixon's request to be allowed to use a velocipede for his own convenience in going to and from his work, it assumed the duty to exercise "a higher degree of care for his protection than if he were simply in the discharge of his ordinary duties as a track repairer," and that he was thereby relieved of all responsibility to keep a lookout for his own protection. In using the track in going to his work he was as much engaged in an ordinary duty as a track repairer as he would have been if he had been at work upon the track. The danger of being on the track, whether on foot or on a velocipede, arising from the operation of trains in either direction

at any time, was known to him and the risk voluntarily assumed by him.

Specifications of Error.

1. The Supreme Court of Appeals of Virginia erred in affirming the action of the trial Court in refusing petitioner's instruction on the duty of maintaining a lookout for track men employed in interstate commerce.

2. The Supreme Court of Appeals of Virginia erred in affirming the action of the trial Court in refusing petitioner's instruction on the assumption of risks by track men employed in interstate commerce.

ARGUMENT.

1. The petitioner owed no duty to track employees engaged in interstate commerce to maintain a lookout for them or to warn them of the approach of trains.

It is settled by the decisions of the Federal courts, both lower and appellate, as well as the State courts in all sections of the country, that a railroad company owes track men engaged in work upon the track, or in using the track in going to and from their work, no duty of warning or lookout. *Connelly v. Pa. Ry. Co.*, 201 Fed., 54, 119 C. C. A., 392.

The evidence plainly discloses that there was nothing unusual in the operation of the train. There was no violation of a statutory requirement, nor was there any failure of compliance with any orders, or recognized custom or rule adopted for the safety of employees. There could be no custom or rule requiring a lookout for track men, be-

cause it would be impossible to know when or where to look out for them. (Rec. p. 217.) In the absence of evidence showing that those in charge of the engine were aware of Nixon's presence on the truck where he was injured, or having discovered him, recklessly ran him down, they should not be held guilty of negligence.

In *Aerkfetz v. Humphreys*, 145 U. S., 418, where an experienced truck man was injured by a moving train in a switching yard, Mr. Justice Brewer, who delivered the opinion of the Court, said:

> "As an employe of long experience in that yard he was familiar with the moving of cars backward and forward by the switch engines. * * * He knew that the switch engine was busy moving cars and making up trains, and that at any minute cars were likely to be moved along the track upon which he was working. * * * There could have been no thought or expectation on the part of the engineman, or of any other employe that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circumstances what negligence can be attributed to the parties in control of the trains, or the management of the yard. They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employe familiar with the manner of doing business would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going out coming, and switch engines moving forward and backward, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employes in the yard, familiar with the continuously recurring movement

of the cars, would take reasonable precaution against their approach. * * * We see in the facts as disclosed no negligence on the part of the defendant."

In *Connelly v. Pa. Ry. Co.*, 201 Fed., 58, 119 C. C. A., 392, where an experienced truck man was killed on its main line in the city of Philadelphia by a train operated by the defendant company, through its negligent failure, as alleged, to give him "due and proper warning of the approach of said train," the Court said:

"We are clear they (the facts) disclose no negligence on the part of the railroad in operating its train and that the deceased's death instead of being caused by any negligence or want of care on the part of the railroad was caused by the risks incident to the employment he followed.

"It is obvious that even where a railroad operates its trains and moves its switch drafts in a proper and careful manner track walkers and repair men are necessarily subjected to great risks. Their very occupation is one of constant peril. Indeed, it follows from the nature of such employment that the duty of self preservation has to rest on them, for no adequate protection other than self protection can be afforded them. And such has been the reasonable holding of the law." Citing *Lovejoy v. Pittsburgh, etc.*

In *Davis v. P. & R. R. R. Co.*, 224 Fed., 187, where an experienced truck man was killed on the main line of the defendant company, the Court said:

"In the absence of evidence that those in charge of the engine were aware of Davis's presence on the track, where he was employed, or that any circumstance

him recklessly ran him down, they should not be held guilty of negligence. To hold to the contrary would indeed unreasonably burden those charged with the grave and responsible duty of operating the instruments of conveyance by rail. It would shift the entire responsibility of caring for the safety of those employed upon the track and place it upon the shoulders of those having to do with the operation of the engine and train, involving attention to signals of every degree of importance, and entirely relieve those who have nothing but their own safety at stake." Citing *Connelly v. Pa. Ry. Co., supra.*

In *Bennett v. A. T. & S. F. Ry. Co.* (Iowa), 183 N. W., 424, the plaintiff's intestate was a track walker who had been in the employ of the company four or five years, and was killed while in the performance of his duties by a passenger train, the crew of which did not see him. The plaintiff relied upon the failure of the defendant to give warning of the approach of its train, as negligence, upon which subject the Court said:

"It is not customary nor is it obligatory to notify a track man of the running of trains, and although Bennett had the right to use the track in the performance of his duties he was bound to know that a train might put in an appearance at any moment, and it was obligatory upon him to look out for his own safety. His duty was as clear as its performance was easy."

In *Kirkland v. Bixby* (*Mo.*), 222 S. W., 462, the defendant was sued for damages resulting from the death of a section foreman while riding on a hand car over the track of the defendant company. The plaintiff's case was submitted

to the jury on the sole ground that the agents in charge of the east-bound freight train were negligent in failing to give the deceased warning of the approach of the train. The Court said:

> "The rule in this state requires section men to protect themselves from passing trains. In other words, the train crew, so far as section men are concerned, have a right to expect a clear track, and the humanitarian rule when violated is the only salvation for the unfortunate section man."

In *Land v. Railroad Company*, 95 Kansas, 441, it was held that a railroad company ordinarily owes no duty to warn section men while at work upon the track of the approach of trains, save when such employees are found in places of danger and it becomes apparent that they will not, or cannot protect themselves. The Court said:

> "Railroads must operate their passenger trains and transport their passengers without impeding their progress or imperiling their safety by the necessity of making it a condition precedent to see if its section men employed for the purpose of keeping the track safe while trains are running over it are themselves looking out for their approach. * * * Track men are employed for the very object and purpose of enabling the railroad to furnish such service and cannot require the employer to impair its efficiency by acting as watchman for them."

2. The deceased, a track repairer employed in interstate commerce, assumed the risk of injury from trains operated without a lookout for him.

It is now well settled that except as to violations of Fed-

eral statutes enacted for the safety of employees, the defense of assumption of risk is a complete bar to the action.

Seaboard Air Line Ry. Co. v. Horton, 233 U. S., 492;
Pryor v. Williams, 254 U. S., 43.

The uncontradicted evidence shows that track men are instructed in regard to the danger and risk arising from the operation of trains in either direction at any time, and of their obligation and duty to keep the track free from obstructions for the uninterrupted passage of trains. They are likewise instructed that the engineman does not maintain a constant lookout ahead; that when necessary to signal a train to stop they must act on the assumption that the engineer is not looking out, and give the signal by torpedoes in addition to the red flag, and that it is incumbent upon them always to keep a lookout for their own safety, and by constant vigilance avoid being struck and injured (Record, pages 216-17).

The rule is thus stated in Elliott on Railroads, Vol. 4, Section 1862:

> "Ordinarily section men or track men assume the risks incident to the running of trains, whether extra trains or trains running on schedule. Section employees are bound to know that the regular trains may be delayed and pass at uncertain intervals, and that wild or extra trains may be sent over the road, and they assume the risks of danger therefrom."

The cases approving this rule, both Federal and State, are almost unlimited. Among them are,

B. & O. Ry. Co. v. Baugh, 149 U. S., 368;
Coine v. Union Pacific Ry. Co., 133 U. S., 370;

N. & W. Ry. Co. v. Gesswine, 144 Fed., 56, 75 C. C. A., 214;

Connelly v. Pa. Ry. Co., 201 Fed., 54, 119 C. C. A., 392;

Davis v. Pa. & Reading Ry. Co., 276 Fed., 187;

Hammond v. Ry. Co., 83 Mich., 334;

Davis, Director General of Railroads, v. Powell, Special Court of Appeals of Virginia, decided Dec. 18, 1924, and reported in Vol. 1, Va. Spec. Court of Appeals Reports, 204.

The Virginia case of *Davis, Director General, &c., v. Powell*, arose under the Federal Employers' Liability Act, and defense was made on the ground of assumed risk. The court reached the conclusion that the plaintiff, a section laborer, assumed the risk, not only of trains approaching him without warning, but also of the negligent operation of the motor car upon which he was riding at the time.

Track men are employed to keep the track in repair for the safe movement of the trains. Transportation cannot be suspended while repair work is going on. "It is apparent," said the court in *Davis, &c., v. Powell, supra*,

> "that the work of repairing, and reaching the points where repairs are to be made, must be accomplished between the running of trains, and those engaged in this kind of work know this," citing *Coine v. Union Pacific Ry. Co.*, 133 U. S., 370.

The work is necessarily hazardous, and requires constant vigilance on the part of those engaged in it from the danger of passing trains:

> "When, therefore, a man contracts for such employment he knows, and takes on himself the risks and dangers incident to such dangerous work, and his assumption of those obvious and inevitable risks is, in the very nature of things, part of his employment. It follows, therefore, that the employer violates no legal duty to the employee in failing to protect him from danger which cannot be escaped by anyone doing such work."
>
> *Connelly v. Penn. Ry., supra.*

The evidence clearly shows that, applying the correct rule of law, Nixon assumed the danger existing at, and just prior to his death, so that his administratrix cannot recover therefor.

For the foregoing errors we now ask that a writ of certiorari issue as prayed for in the petition, in support of which this brief is filed, and that the case be reversed.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX.

"Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, * * * and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, or to proceed *in rem* * * *, and to recover damages in respect thereof, then and in every such case the person who, or the corporation * * * which, would have been liable, if death had not ensued, shall be liable to an action for damages * * *, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."

Virginia Code of 1919, Section 5786.

"* * * The jury in any such action may award such damages as to it may seem fair and just, not exceeding ten thousand dollars, and may direct in what proportion they shall be distributed * * *."

Virginia Code of 1919, Section 5787.

"Every common carrier by railroad engaged in intrastate commerce shall be liable in damages to any of its employees suffering injury while he is employed by such carrier in such commerce, and in case of his death, to his personal representative, for such injury or death, resulting in whole or in part from, the wrongful act or neglect of any of the officers, agents, servants or employees of such carrier, or by reason of any defect or insufficiency, due to its neglect, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. If the action be for the death of an employee, sections 5787, 5788, 5789, and 5790 shall apply thereto as far as applicable. No action shall be maintained under this section, unless it be commenced within one year from the day the cause of action accrued.

Virginia Code 1919, Section 5791.